

October 31, 2003

Jeffrey W. Pratt, Director  
Department for Environmental Protection  
Division of Water  
14 Reilly Road  
Frankfort, Kentucky 40601-1190

Re: Comments of AIK/CIC Regarding Proposed Amendments to  
401 KAR 5:002; 401 KAR 5:026; 401 KAR 5:029; 401 KAR 5:030 and  
401 KAR 5:031

Dear Mr. Pratt:

Associated Industries of Kentucky's Chemical Industry Council (AIK/CIC) welcomes the opportunity to submit comments regarding the Division of Water's (DOW) proposed amendments to the above-referenced administrative regulations.

#### **GENERAL COMMENTS**

For more than two decades, Kentucky has struggled to develop water quality standards that have the approval of U.S. EPA. This prolonged effort neared a successful conclusion in 1999 when DOW's triennial review resulted in promulgation of regulations that left only a limited provision of the antidegradation implementation regulation, 401 KAR 5:030, lacking federal approval. AIK/CIC strongly suggests that DOW not jeopardize progress by making unnecessary changes in its water quality standards.

AIK/CIC also believes that it would be inherently unfair to apply revised standards to KPDES permit applications that have already been submitted and suggest that revised standards be applied only to applications submitted after U.S. EPA takes final action on the revised standards.

#### **SPECIFIC COMMENTS**

*401 KAR 5:002*

DOW should not delete the definition of "use protected water" since U.S. EPA approved the DOW regulations relating to use protected waters in August of 2000.

*401 KAR 5:029*

- Section 1(2) – This revision would be unnecessary if DOW restricts its amendments in 401 KAR 5:030 to the limited revisions disapproved by U.S. EPA in 2000.
- Section 4(5) and (10) – In August of 2000, U.S. EPA fully approved Kentucky's mixing zone regulations. AIK/CIC believes that the proposed revision unnecessarily reopens debate on this highly controversial subject. If DOW proceeds with this revision, DOW should document the impact of its actions in its regulatory impact analysis so that the general public and reviewing legislative committees may properly evaluate the wisdom of these unnecessary changes. Furthermore, AIK/CIC questions whether this proposed revision is consistent with, or required by, federal law or regulation. Additionally, AIK/CIC requests that, at a minimum, DOW delete the vague reference to "adverse modification of such species' critical habitat."

*401 KAR 5:030*

- Section (1) – AIK/CIC suggests that DOW revise this regulation only as necessary to address U.S. EPA's August 2000 partial disapproval. AIK/CIC does not believe that it is appropriate for DOW to use a "default" to high quality water. Rather, AIK/CIC believes that DOW could address U.S. EPA's concerns by simply adding language consistent with the following to the existing Tier 2 selection criteria: all streams that DOW determines on a stream-by-stream basis to have quality better than required. This approach would satisfy U.S. EPA's objections while making the minimum changes to the present state regulations.

In addition, AIK/CIC objects to the inclusion of the "non-preemption" language for local governments. Implementation of the antidegradation process is solely a province of the federal government that has been delegated to the Commonwealth. The Commonwealth cannot, and should not attempt to, tacitly provide for local programs on this topic.

- Section 1(2)(a)(4) – The concept of "reference reach network" is not generally understood in the regulated community and should be eliminated or clarified.
- Section 1(2)(b) – AIK/CIC supports the proposed revisions to the regulation relating to the applicability of antidegradation review since those revisions would allow DOW to focus its resources on those activities that have real potential to degrade water quality.
- Section 1(2)(b)(7) – AIK/CIC opposes the proposal to establish 120% of cost as the test of economic infeasibility. If DOW unwisely proceeds with such a "bright line" test of economic feasibility, it should be applied only to the water

pollution control features of the proposed activity. AIK/CIC also suggests that DOW delete references to the U.S. EPA guidance document since it has not been adopted as a federal requirement.

- Section 1(3)(b) – AIK/CIC urges DOW to clarify that impaired waters or use protected waters are not included in this category. In addition, AIK/CIC believes that "modifications" should be included in Section 1(3)(b)1.e. Further, AIK/CIC requests that DOW clarify that the provisions of Section 1(3)(b)2. and 4. are stated in the alternative. Finally, the reference in Section 1(3)(b)2. to pollutants not found in Table 1, Section 6 of 401 KAR 5:031 is confusing and should be deleted. AIK/CIC's comments regarding 401 KAR 5:030 Sections 1(2)(b) and 1(2)(b)(7) also apply to this provision.
- Section 1(4) – DOW should include a provision for identification of additional streams as impaired waters based upon water quality data developed outside the 33 U.S.C. § 1315 process.
- Suggested Section 4 – AIK/CIC believes that DOW's proposal reflects compromises on regulatory approaches that balance environmental and economic consideration. This balance should be maintained in any final regulation after all administrative and judicial review has been completed. In order to preserve this balance, AIK/CIC suggests that the regulation include a non-severability provision.

Once again, AIK/CIC appreciates the opportunity to submit the above comments and urges DOW's favorable consideration thereof. Please do not hesitate to contact me with any questions you may have.

Sincerely,

Lloyd R. Cress, Jr.